Community Health Plan of Suffolk, Inc. *and* Office and Professional Employees International Union, Local 153, AFL–CIO

Community Health Plan of Suffolk, Inc. and Community Health Plan of Suffolk, Inc. as Debtor in Possession *and* Office and Professional Employees International Union, Local 153, AFL–CIO. Cases 29–CA–15716 and 29–CA–15820

January 17, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Upon charges filed by the Union on May 7, 1991, and on June 27, 1991, the General Counsel of the National Labor Relations Board issued a consolidated complaint on June 28, 1991, against the Community Health Plan of Suffolk, Inc., the Respondent, and the Community Health Plan of Suffolk, Inc., Debtor in Possession (Respondent Debtor or collectively the Respondents), alleging that they have violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondents have failed to file an answer.

On October 11, 1991, the General Counsel filed a Motion for Summary Judgment. On October 21, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 4, 1991, counsel for the Respondents filed a response to the Board's Notice to Show Cause. The letter states that the Respondents have filed for Chapter 11 bankruptcy, and that, under Section 362 of the United States Bankruptcy Code, such filing operates as an automatic stay applicable to the Respondent Debtor and its estate. The letter also advised the Board that it must seek relief from the automatic stay in the United States Bankruptcy Court for the Eastern District of New York.[1] The allegations in the motion are undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all the allegations in the Consolidated Complaint shall be deemed to be admitted by them to be true and may be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that counsel for the General Counsel, by letter dated August 23, 1991, notified the Respondent that unless an answer was received by close of business on September 6, 1991, a Motion for Summary Judgment would be filed. By letter dated September 5, 1991, the Respondent's counsel responded to the General Counsel's letter by stating that the Respondent was in the process of being liquidated and that it intended to file a Chapter 11 liquidation plan in U.S. Bankruptcy Court for the Eastern District of New York. Counsel for the Respondent stated in the letter that "[n]o answer will be filed by this office in conjunction with the National Labor Relations Board Notice of Hearing," and suggested that the Board should file a claim in the bankruptcy proceeding with the United States Bankruptcy Court.[2] The Respondents have not filed an answer to date nor requested an extension of time in which to file an answer.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation, has its principal office and place of business located in the Village of Hauppauge, County of Suffolk, State of New York,[3] and has been engaged in the operation of a medical clinic, administering medical tests and prehospital screenings for the general public. During the year ending December 31, 1990, a representative period, the Respondent in the course and conduct of its business operations, derived gross revenues therefrom in excess of $250,000. During the same representative period,

[1] The Respondents' claim of bankruptcy will not operate as a stay of the unfair labor practice charges against it. It is well settled that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. *Cardinal Services*, 295 NLRB No. 96 fn. 2 (June 30, 1989); *Phoenix Co.*, 274 NLRB 995 (1985); *Aries Construction*, 290 NLRB No. 64 fn. 1 (July 29, 1988) (not reported in Board volumes). Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers. See *Phoenix Co.*, supra, and cases cited therein.

[2] As stated above, the Respondents' claim of bankruptcy will not operate as a stay of the unfair labor practice charges against it. See fn. 1, supra.

[3] The complaint inadvertently alleges Hauppauge to be in the City of New York.

the Respondent, in the course and conduct of its business operations, purchased and received at its clinic located in the State of New York products, goods, and materials valued in excess of $50,000 from other enterprises located within the State of New York, each of which other enterprises had purchased and received the said products, goods, and materials directly from points outside the State of New York.

Since on or about May 7, 1991, the Respondent Debtor has been duly designated by a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of New York as debtor-in-possession with full authority to continue operations and exercise all powers necessary to the administration of the business of the Respondent.

We find that the Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit*

The following employees of the Respondents constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time and budget part-time clerical and technical employees, including Medical Assistants I and II, Secretary to the Administrator for Clinical Health Services, Budget Analyst and Marketing Representatives, excluding guards and supervisors as defined in Section 2(11) of the Act.

B. *The Refusal to Bargain*

Since about June 1, 1988, or sometime prior thereto, the Union has been the designated exclusive collective-bargaining representative of the unit employees and has been recognized as such representative by the Respondents. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period from June 1, 1988, to May 31, 1991.

Article 19, section I, of the collective-bargaining agreement provides in pertinent part:

> The employee with the least amount of seniority in any classification will be the first laid off from that job. He/she, in turn, may replace an employee in the same or lower grade with the least seniority in that grade providing he/she has the qualification to satisfactorily perform the job and has greater seniority. . . .

Article 19, section II provides in pertinent part:

> The Union may designate six (6) stewards for the purposes of layoffs and recall, the six (6) stewards shall have super seniority. . . .

The Respondents informed unit employee, Phillis Rice, a medical assistant, by letter dated May 2, 1991, that she was laid off incident to an economic layoff conducted by the Respondents effective June 1, 1991, notwithstanding that as a steward for the Union she had superseniority for the purposes of layoff pursuant to the terms of the collective-bargaining agreement, and should have been given permission to bump into another department in which she was qualified to perform the work. On June 1, 1991, the Respondents laid off employee Rice, notwithstanding that there were positions available in the medical records department into which she should have been given the opportunity to bump, pursuant to article 19 of the collective-bargaining agreement. They took these actions without regard to the relevant contractual provisions and without giving prior notice to and bargaining with the Union.

Sometime in May 1991, the Respondents, through Frank Caruso, the assistant administrator and agent at the clinic, threatened employees that it would cease dealing with the Union and cease complying with the collective-bargaining agreement.

We find that the Respondents, by failing and refusing to bargain collectively with the Union by failing to adhere to article 19 of the most recent collective-bargaining agreement with regard to Rice's layoff, have engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. We also find that the Respondents, by threatening employees that it would cease dealing with the Union and cease complying with the collective-bargaining agreement, have engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By failing and refusing to bargain collectively with the Union by failing to adhere to the provisions of article 19 of the most recent collective-bargaining agreement with regard to Rice's layoff, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By threatening employees sometime during May 1991, through Assistant Administrator Caruso, that it would cease dealing with the Union and

cease complying with the collective-bargaining agreement, which was effective by its terms to May 31, 1991, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Accordingly, we shall order the Respondents to comply with the provisions of article 19 of the most recent collective-bargaining agreement by offering Phyllis Rice immediate and full reinstatement to an appropriate position, without prejudice to her seniority or other rights and privileges, and to make her whole for all wages and benefits lost as a result of her unlawful discharge. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). By letter dated September 5, 1991, the Respondent's counsel asserted to counsel for the General Counsel that the Respondent was out of business and had vacated the premises. In accordance with the request of counsel for the General Counsel, we shall conditionally provide for the mailing of notices to the unit employees in the event the Respondent has ceased operations.[4]

ORDER

The National Labor Relations Board orders that the Respondents, Community Health Plan of Suffolk, Inc., and Community Health Plan of Suffolk, Inc., as Debtor in Possession, Hauppauge, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Office and Professional Employees International Union, Local 153, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit by failing and refusing to adhere to the provisions of article 19 of the most recent collective-bargaining agreement by laying off employee Phyllis Rice.

(b) Threatening employees that it will cease dealing with the Union and cease complying with the collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Phyllis Rice immediate and full reinstatement to an appropriate position in compliance with article 19 of the most recent collective-bargaining agreement, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings and benefits suffered by reason of her unlawful layoff on June 1, 1991, in the manner set forth in the remedy section of this decision.

(b) Withdraw, rescind, and expunge from its files any and all reference to the layoff of Phyllis Rice, and notify her in writing that this has been done and that this will not be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of money due under the terms of this Order.

(d) Post at its facility in Hauppauge, New York, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has ceased operations, copies of the attached notice shall be mailed to the unit employees by the Respondent.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] We shall leave to the compliance stage of this proceeding the determination of whether the Respondent has ceased operations and the effect of any closure on our Order.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT not refuse to bargain with the Office and Professional Employees International Union, Local 153, AFL–CIO as the exclusive representative of the employees in the bargaining unit by failing to adhere to the provisions of article 19 of the most recent collective-bargaining agreement by laying off employee Phyllis Rice.

WE WILL NOT threaten employees that we will cease dealing with the Union and cease complying with the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer employee Rice immediate and full reinstatement to an appropriate position in compliance with article 19 of the most recent collective-bargaining agreement, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings or benefits suffered by reason of her unlawful layoff on June 1, 1991, with interest.

WE WILL withdraw, rescind, and expunge from our files any and all references to the layoff of employee Rice, and notify her in writing that this has been done and that this will not be used against her in any way.

COMMUNITY HEALTH PLAN OF SUFFOLK, INC.